IN THE SUPREME COURT OF THE

UNITED STATES

NO. 82-6306

CHASTINE LEE RAINES,

PETITIONER,

VS.

THE STATE OF ALABAMA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

I. Whether the imposition of the death penalty pursuant to the Construction given the Alabama Death Penalty statute by the Supreme Court of Alabama in Beck vs. State, 396 So. 2d 645 (1980), would deprive the Appellant of his life without due process of law?

II. Whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life, and was convicted solely as an accomplice to the robbery under the Felony-Murder Doctrine in contravention of the Alabama Code of 1975, Section 13A-5-31(b)?

III. Whether a variance between the indictment and the proof, in regard to the capacity of Milton Mayfield as the robbery victim as such is defined by Section 13A-5-31(a)(2), deprive the Appellant of sufficient notice and the opportunity to defend himself against the crime for which he was charged and therefore denied him due process of law under the Fifth and Fourteenth Amendments

to the Federal Constitution?

IV. Whether the death sentence, in and of itself, is disproportionately inconsistent with the Eighth and Fourteenth Amendments to the Federal Constitution?

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner, Chastine Lee Raines, prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Alabama entered on December 30, 1982, affirming his conviction under the provisions of Title 13A, Section 5-31(a)(2), Code of Alabama, (1975) for robbery or attempt thereof when the victim was intentionally killed by the Defendant, otherwise known as the Death Penalty Act in Alabama.

OPINION BELOW

The opinion of the Alabama Court of Appeals is attached as Exhibit "A" and it has been reported and is included herewith. A Writ of Certiorari was granted by the Supreme Court of Alabama and an opinion was issued and is attached herewith and marked as Exhibit "B".

JURISDICTION

The jurisdiction of this Court is invoked by virtue of U.S.C. Section 1257, et seq, and by virtue of the fact that a stay of judgment

was mandated on January 19, 1983 wherein the Petitioner was allowed thirty (30) days from December 30, 1982 to file this Writ of Certiorari to the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Eighth, and Fourteenth Amendments to the Constitution; Code of Alabama (1975), Section 13A-5-31(a)(2).

STATEMENT OF THE CASE

On November 26, 1980, Mary Johnson was on her way to Zugster's Market in the Powderly area of Birmingham to cash a check. (R-388) Prior to entering the market, Mrs. Johnson saw three black men standing outside. (R-389) William Sanders, the armed guard employed by L. E. Owens, the market's owner, was on duty and saw two black men walk up the street in front of the market. (R-422) After cashing her check, Mrs. Johnson left the market and on her way out saw the same three black men. (R-390) As she crossed the street and headed home, one of the men followed her across the street

and had a brief conversation with her. (R-391)

At approximately 11:00 A.M., two light complected black men entered the market through one of its two front doors. (R-342) (R-377) One of the men approached the cahsier's cage and the other walked down the length of the market's meat counter to the other end of the store. (R-343) At this time, there were several other people in the market. L. E. Owens, the owner, was in the cashier's cage talking to his wife, Mary Owens, who was standing in front of the cage on her way out of the market. (R-340) Mr. Sanders, the guard, was standing next to the second entrance at the other end of the market greeting two customers. Mr. John Morgan and his wife, Sharri Darlene Morgan, who had just entered the store by way of that entrance. (R-352) (R-470) Milton Mayfield was behind the meat counter with the other butchers some 22 feet from the cashier's cage. (R-340) Eugster's Market is in a rectangular construction, being 30'5" deep and 72'8" wide, with an entrance

at each end. (R-323).

As the second black man reached the other end of the market, near Mr. Sanders and the Morgans, the first man jumped up on the check out counter holding a cloth bag and a handgun. (R-342) The man on the counter told everyone to get down. (R-343) At the same time the second man came up behind Mr. Sanders, who had been facing the window in front of the market, struck him with his gun and disarmed him, pushing him to the ground next to the Morgans. (R-425) (R-471) Milton Mayfield failed to react to the demand to get down and was shot and killed. (R-343) Mayfield was 79 years old, had poor vision and a hearing impairment. (R-362) After the shooting, the first man told Mr. Owens to put the money in the cloth bag. (R-344) The second man then walked back up to the cashier's cage and said "Let's get out of here", and both men left the market. (R-347) The two men were in the market for approximately 2 1/2 to 3 minutes. (R-361)

After the holdup men left the store, Sanders went to the front of the market and got a shotgun

from the cashier's cage. Sanders then stopped a car out front and pursued the holdup men. (R-452) He drove down the street until he reached the corner where he saw Junior Wormley standing on his front porch. (R-454) Sanders asked Wormley if he had seen anyone. (R-455) Wormley told him that he had seen two men running down the street to the corner where they were picked up by a faded blue two door car with a dark top. (R-528) Sanders told Wormley that they had robbed the store and shot Mayfield. (R-529) He stated further that they had come up behind him before he could see anything. (R-529) (R-530) Sanders then drove off in pursuit of the faded blue car. (R-531)

Mrs. Johnson had reached her home by the time the shooting occurred. (R-390) She knew nothing of what had happened until she heard an ambulance. (R-391) She told a neighbor that she had seen three men outside of the market. (R-392)

Officer Coy W. Hale, of the Birmingham Police Department, arrived at the scene at approximately 11:15 A.M. and interviewed the witnesses. (R-514)

Sanders, John Morgan and Junior Wormley all described both men as light skinned black men. (R-516) The other witnesses could not agree on their descriptions. (R-520) Sergeant Albert Wallace, of the homicide division of the Birmingham Police Department, arrived at the scene and interviewed Mr. and Mrs. Owens and Sanders. (R-488) The investigating officers canvassed the neighborhood in search of any potential witnesses when Wallace was told that Mary Johnson had seen three men prior to the robbery. (R-134) Wallace showed pictures to Mrs. Johnson, Sanders and Wormley. Neither of them picked out anyone shown in the pictures. (R-499) Mrs. Johnson later testified that she had recognized the Appellant's picture but that she said nothing to Wallace because she did not want to get involved. (R-75) Sergeant Wallace later testified on two occasions at the Preliminary and Suppression Hearings that he had not shown the witnesses a picture of the Appellant because he was not a suspect at the time. (R-135) (R-512)

On December 15, 1980, a Consumer Warehouse

store in the City of Birmingham was robbed. (R-115) On December 25, 1980, Christmas Day, Officer Edward Alley, Jr. of the Birmingham Police Department was shot and killed. (R-114) Two men, Daryl Watkins and Benny Ray Jones, were arrested as suspects in the Alley shooting.

The Appellant was contacted by Sergeant Tommy W. McDonald of the Birmingham Police Department and was asked to come in and discuss the Alley shooting. At the time this request was made the Appellant was not a suspect in the Mayfield shooting. (R-117-118) When the Appellant refused to cooperate with McDonald he was arrested on suspicion of being involved in the Consumer Warehouse robbery and taken to the City Jail. (R-115) The Appellant had previously been contacted by Linn Moore of the Jefferson County Sheriff's Department but without reference to the Consumer Warehouse robbery. (R-65)

Sergeant Wallace who had been assigned to the Mayfield shooting had no knowledge of the Appellant until after Appellant's arrest. (R-117)

A lineup was held on December 27, 1980. (R-488)

Mrs. Johnson refused to attend until she was contacted and visited by Richard Arrington, the Mayor of Birmingham, who convinced her to attend the lineup. (R-408) There were approximately twelve lineups on that day involving several different cases, which included the Alley shooting, and the Eugster's case, there was no lineup on the Consumer Warehouse robbery. (R-56) The lineups were precipitated by the Alley shooting. (R-60)

Mary Johnson, William Sanders, Sharri Darlene Morgan and Mrs. Mary Owens attended the lineup. (R-489) Junior Wormley was not asked to attend. (R-533) The Appellant, Benny Ray Jones and Daryl Watkins were shown in all of the lineups. (R-59) Mrs. Johnson identified the Appellant, Benny Ray Jones and Daryl Watkins. (R-493) She later testified that her identification of the Appellant was at least partly based upon the picture which she had allegedly been shown. (R-78) Mrs. Morgan and Mrs. Owens identified Watkins. (R-475)(R-380)(R-493) Neither could identify the Appellant but Morgan identified Benny Ray Jones. (R-498)(R-475)(R-387) Sanders identified

the Appellant. (R-429)(R-493) The Appellant, based on identifications by two of the four witnesses attending the lineup, was arrested and charged with participation in the Eugster's robbery-murder. (R-494)

Prior to the trial Appellant filed a discovery motion requesting all exculpatory evidence which was granted. (R-789) The identification sheet indicating who was identified by which witnesses was not disclosed to him. Appellant also filed a motion to suppress and a hearing was held on June 3, 1981. (R-1) This motion was denied. (R-150) The trial was held on June 15, 1981.

Subsequent to the trial, the case was appealed to the Alabama Court of Criminal Appeals wherein on April 20, 1982, the Court of Criminal Appeals affirmed the lower court's conviction. Whereupon, the Petitioner filed a Writ of Certiorari to the Supreme Court of Alabama on or about June 1, 1982. Wherein, on August 18, 1982, the Supreme Court of Alabama granted the Petition for Writ of Certiorari, as required by Rule 39, of the Alabama Rules of

Appellate Procedure. Wherein, the Supreme Court of Alabama affirmed the decision of the Alabama Court of Criminal Appeals on December 30, 1982.

REASONS THE WRIT SHOULD BE GRANTED

While there are several compelling reasons that this Court should grant this Writ of Certiorari, the central and most compelling reason is that your Petitioner is an individual who has been convicted under the Alabama Death Penalty statute of capital murder when he was in fact not the "trigger man". Alabama Statute does not allow for a person to be convicted of capital murder under the Felony-Murder Doctrine. In fact, this is what has happened in this case.

The intent of the Alabama Legislature when it passed its death penalty statute was to enact legislation that safeguarded a situation where an aider or abetter could not be held for the ultimate punishment unless he intentionally murdered the victim during the course of a robbery. The Petitioner herein had any intent to murder anyone and did not commit the homicide, these facts are undisputed. The dispute arises from where do you draw the line in relation to if at anytime under the Alabama Statute a non-trigger

man can be hald liable for the ultimate punishment.

The State of Alabama relies on the case of Ritter vs. State, 375 So. 2d 270, to hold your Petitioner for the ultimate punishment. The Ritter case has been before this Court several times and could not be a more horrible case to decide whether or not an accomplice or non-trigger man liable for the ultimate punishment.

Succintly, the facts in Ritter were that Ritter himself testified at his trial that he would have killed the victim of the robbery had not his co-defendant been in his line of fire. If Ritter is one extreme, then the case of Enmund vs. Florida, _____U.S._____; No. 81-5321, July 2, 1982 is the other. Your Petitioner contends that the Supreme Court of Alabama has interpreted the Alabama Statute in such a way that it violates his Fifth, Eighth and Fourteenth Amendment rights under the Federal Constitution and this interpretation is of such significance to this Petitioner and all similarly situated individuals within the State of Alabama.

Your petitioner contends that it is time for this Honorable Court to come to grips with the death penalty both on this issue and the issue of whether or not the death penalty is in and of itself a disproportionate punishment under the Eighth Amendment of the Constitution.

Taken with the Eighth Amendment-cruel and unusual punishment-proposition the Petitioner contends that he was denied due process because the State of Alabama had no intention to hold a principal, much less an accomplice liable for a capital crime for the intentional killing of a bystander. The Alabama Statute is quite clear that the person that is murdered must be the victim of the underlying felony. This position is the State of Alabama's position. An Assistant Attorney General for the State of Alabama has taken in a law review article wherein he discussed this very aspect of the Alabama Death Penalty statute. (See Carnes, Alabama's 1981 capital punishment statute, 42 Alabama Law Review, 456 (July, 1981)).

In that article, the State takes the position that bystanders do not come within the Alabama Code 1975, Section 13A-5-30, et seq. and to illustrate the point, the Alabama Legislature enacted a new Death Penalty Act sufficiently filling this loop-hole to broaden the "definition of victim". (See Exhibit "A"- the decision of the Alabama Supreme Court, Page Four, Footnote One). It should therefore be exceedingly clear that your Petitioner's case should be reviewed by this Court because the existing decision of the Alabama Supreme Court has denied him due process of law under the Fifth Amendment to the Federal Constitution and therefore would exert a disproportionate punishment by virtue of the Eighth Amendment to the Federal Constitution.

The Petitioner next contends that this Honorable Court should grant this Writ of Certiorari by virtue of the fact that after properly filing disclosure motions at the trial, the State failed to reveal certain information to the Defendant as it is related to a lineup identification. Your Petitioner feels that this was a violation of

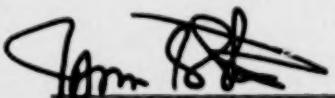
Brady vs. Maryland, 373 U.S. 83 (1963). The Supreme Court of Alabama has relied on the proposition of law, enunciated in this Court's decision of United States vs. Agurs, 47 U.S. 97 (1976), wherein the Defendant must establish that the information not disclosed must create a reaonable doubt where one otherwise did not exist. Your Petitioner would suggest that this Honorable Court review this position as stated in Agurs, supra, because when the nondisclosure is discovered during the trial, as it was in this case, it requires the Judge to speculate as to what the jury verdict might be. Must the Judge say to the Defendant, "I think this evidence that has now been discovered does not create a reasonable doubt and therfore I deny your Motion for Mistrial" or must he say to the State, "I believe this nondisclosed evidence creates a reasonable doubt in the minds of the jury and therefore I grant the Defendant's Motion for Mistrial" or dismiss the case against the Defendant. Petitioner contends that this issue is of such significance

that it should be reviewed by this Court in light of the above mentioned cases.

For all of the foregoing reasons, your Petitioner requests that this Honorable Court grant his Petition for Writ of Certiorari because the Alabama Supreme Court has chose to effectively circumvent Enmund, supra and in its place substitute its own "Ritter" decision. It is contended that the "particularized intent" is of such a vague nature that the Petitioner and other similarly situated Defendants cannot possibly have foreknowledge of what to defend against.

CONCLUSION

Your Petitioner requests that this Honorable Court, for all the foregoing stated reasons should grant his Writ of Certiorari to the Alabama Supreme Court.



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THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1982-83

Ex Parte: Chastine Lee Raines

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Chastine Lee Raines, Alias

81-746 v.

State of Alabama)

PER CURIAM.

Because many of the questions presented by this appeal have been resolved for all future cases by Act No. 178, Ala. Acts 1981, this opinion has limited application for cases involving persons convicted after July 1, 1981. The facts relevant to this appeal have been set out in detail in the opinion of the Court of Criminal Appeals, Raines v. State

[MS. April 20, 1982], ___ So. 2d ___ (Ala. Crim. App. 1982), and need not be repeated here.

Briefly, defendant was indicted and convicted under Ala. Code 1975, § 13A-5-31(a)(2), (Supp. 1977), for robbery or attempt thereof when the victim is intentionally killed by the defendant, and, after a separate sentence hearing, defendant was sentenced to death. The robbery was of Eugster's Meat Market in the Powderly area of Birmingham. The victim was seventy-nine-year-old Milton Mayfield, a store employee at Eugster's who was operating a slicing machine at the time of the robbery.

The Court of Criminal Appeals affirmed the conviction and sentence of defendant, holding specifically that: (1) Mr. Mayfield was a victim of the robbery within the meaning of § 13A-5-31(a)(2); (2) the defendant, even though a non-triggerman, had the "particularized intent to kill" necessary to determine that the victim was "intentionally killed by the defendant"; and (3) the sentence hearing was conducted in accordance with the statute and the guidelines outlined by this Court in Beck v. State, 396 So. 2d 645 (Ala. 1980).

The defendant petitioned this Court for a writ of certiorari to the Court of Criminal Appeals, which we granted. We affirm.

At the outset, we hold once again that the death penalty provisions under which defendant was convicted are constitutional. Beck v. State, 396 So. 2d 645 (Ala. 1980).

The appellant contends that imposing the death penalty upon a defendant convicted of the capital offense of robbery when the victim is intentionally killed is disproportional to the crime, in violation of the eighth and fourteenth amendments, where the defendant did not actually kill the victim and was convicted solely as an accomplice to the robbery. We disagree.

We have previously held that, while the legislature has prohibited the use of the felony-murder rule to supply the necessary intent in capital felony trials, the accomplice liability doctrine may be used to convict a non-triggerman accomplice if, but only if, the defendant was an accomplice in the intentional killing as opposed to being an accomplice merely in the underlying felony. Ritter v. State, 375 So. 2d 270 (Ala. 1979). An accomplice to the intentional killing is one who aids and abets the killing by any assistance rendered through "acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary." Id. at 274.

The complex appellate history of Ritter since the time of this Court's original opinion has been based on grounds other than those presented for review here, and we hold that it is still the law in this state that a non-triggerman accomplice may be convicted of a capital offense and sentenced to death if the state proves that the defendant was an accomplice to the intentional killing.

We take notice of the United States Supreme Court's recent decision in Enmund v. Florida, ___ U.S. ___, 102 S. Ct. 3368 (1982), relied upon by appellant, and find that opinion in no way is inconsistent with our previous holdings in Ritter, supra. The Court held in Enmund that the driver of the getaway car could not be convicted of a capital offense where he did not "himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Enmund, supra, at 3376-77 (emphasis supplied). The opinion is entirely consistent with our requirement of proof of a "particularized intent to kill" by the non-triggerman accomplice.

The question remains, therefore, whether the record contains sufficient proof of an intent of the defendant to kill. We hold that it does.

Pulling the trigger is only one factor in determining intent to kill. Ritter v. State, 375 So. 2d 270, 274-275 (Ala. 1979). From the testimony concerning the defendant's words and actions during the course of the robbery, the jury had sufficient evidence from which to infer that the defendant was prepared to kill, intended to kill, and supported Watkins in his killing of Mr. Mayfield and, thus, that the defendant was an accomplice to the intentional killing of Mr. Mayfield.

To affirm a finding of a "particularized intent to kill," the jury must be properly charged on the intent to kill issue, and there must be sufficient evidence from which a rational jury could conclude that the defendant possessed the intent to kill. The Court of Criminal Appeals found in the affirmative on both parts of this two-part test; and, upon careful review of the record, we discern no basis for disturbing that finding.

Defendant next contends that Mr. Mayfield was not a victim of the robbery within the meaning of § 13A-5-31(a)(2), under which he was convicted. This issue arises because § 13A-5-31(a)(2) apparently means that if the defendant robs one person but intentionally kills another person, such as a bystander, then the defendant has not committed a capital offense. See Carnes, Alabama's 1981 Capital Punishment Statute, 42 Ala. Law. 456 (July, 1981).[1] It is for us to decide, therefore, whether Mr. Mayfield was a victim of the robbery as opposed to a mere bystander.

Our review of the record and of the opinion of the Court of Criminal Appeals, Raines v. State [MS. April 20, 1982], ___ So. 2d ___ (Ala. Crim. App. 1982), convinces us

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1. This loophole has been effectively closed by Act No. 178, Ala. Acts 1981, which makes "[m]urder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant" a capital offense. The new statute, therefore, is broad enough to include bystanders.

that that opinion correctly states the law in this state defining robbery victims, and that it correctly applies that law to the facts of this case, and, therefore, we affirm and adopt that section of the opinion of the Court of Criminal Appeals into the opinion of this Court, thereby holding that, as a matter of law, Mr. Mayfield was a victim of the robbery within the meaning of § 13A-5-31(a)(2).

Finally, appellant contends that the state's delayed disclosure of lineup information entitled him to a new trial. Again, we do not agree.

The information was put before the jury and, in the words of the trial court, "dealt a jolt" to the state. The information was subject to a "thorough and sifting cross examination," as the Court of Criminal Appeals held. The information was exploited as fully as it could have been, in contrast to the total suppression of exculpatory evidence found in Brady v. Maryland, 373 U.S. 83 (1963).

Even in the case of total nondisclosure, the information must create a reasonable doubt where one did not otherwise exist. United States v. Agurs, 427 U.S. 97 (1976). The defendant's burden is to show that reasonable doubt "not as a matter of speculation, but as a demonstrable reality." Beck v. Washington, 369 U.S. 541, 558 (1962). We agree with the Court of Criminal Appeals that the appellant has failed to show how he was actually harmed by the delayed disclosure of the information. Appellant's argument that the information would have enabled more effective preparation for trial was rejected in United States v. Agurs, supra, at 112 n. 20, on the grounds that an argument could always be made that knowledge of the prosecutor's case, both incriminating and exculpatory, would help defense counsel in preparation of the case for the defense. Therefore, the proper focus is upon the materiality in the nondisclosure or delayed disclosure of exculpatory

information in determining the denial vel non of defendant's rights of due process and fair trial -- a showing not made by this defendant.

For the foregoing reasons and also because this Court has found that the sentence hearing complied with all statutory and constitutional requirements, defendant's conviction and sentence of death are affirmed.

AFFIRMED.

All the Justices concur, except Embry, J., not sitting.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 30 day of Dec, 19 82

Dorothy F. Norwood

Acting Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1981-82

6 Div. 688

Chastine Lee Raines, alias

v.

State

Appeal from Jefferson Circuit Court

DeCARLO, JUDGE

Appellant was indicted and convicted under Alabama Code § 13A-5-31 (a) (2) (Supp. 1977) for robbery or attempts thereof when the victim is intentionally killed by the defendant. His punishment was fixed at death. The central question before us

is whether or not a store employee who was intentionally killed during the commission of a robbery, but who had no money or other property taken from his actual person, constitutes a victim of a robbery for the purpose of Alabama's capital felony provisions.

Appellant and Darryl Travis Watkins entered Eugster's Meat Market in the Powderly area of Birmingham around 10:30 A. M. on November 26, 1980. Both appellant and Watkins were armed with pistols. Mr. L. E. Owens (the owner of the market), his wife, a security guard, three or four butchers and two customers were in the store at that time. As appellant and Watkins came in the front door appellant walked toward the meat counter, knocked the security guard to the floor by striking him with his pistol, took the security guard's pistol away from him and told him to "lay down or I'll kill you." At the same time Watkins pushed Mrs. Owens and jumped up on a counter between the cashier's cage and the meat counter. Watkins ordered everyone to "get down" and to "move it."

Seventy-nine year-old Milton Mayfield, the deceased, was operating a slicing machine located twenty-two feet from the cashier's cage directly in Watkins' line of fire. The deceased's vision was poor and he also had a hearing impairment. When Watkins ordered everyone to "get down" the deceased either could not comprehend Watkins' commands or for some other reason failed to respond. Watkins' then took direct aim and shot the deceased between the eyes. Watkins next held his gun to Mrs. Owens' head and ordered Mr. Owens, who was standing inside the cashier's cage, "to give him all the money." Mr. Owens placed approximately $2,400. in the yellow bag he was handed by Watkins. Appellant and Watkins then fled from the scene by running out the front door.

I

Omitting the formal parts, the indictment charged the following:

> "The grand jury of said county charge that, before the finding of this indictment, CHASTINE LEE RAINES, alias CHESTINE LEE RAINES, alias MICHAEL RAINES, alias CHESTER RAINES, whose

name is to the Grand Jury otherwise unknown, did, in the course of committing a theft of Twenty-four Hundred Dollars of the lawful currency of the United States of America, a more particular description and denomination of which is to the Grand Jury otherwise unknown, the property of Milton Mayfield, use force against the person of Milton Mayfield, with intent to overcome his physical resistence or physical power of resistence, while the said CHASTINE LEE RAINES was armed with a deadly weapon, a pistol, and did feloniously take the Twenty-Four Hundred Dollars of the lawful currency of the United States of America, a more particular description and denomination of which is to the Grand Jury otherwise unknown, from Milton Mayfield's person or in his presence, and against his will by violence to his person, or by putting him in such fear as unwillingly to part with the same, and in the course of said robbery, the said CHASTAINE [sic] LEE RAINES did intentionally cause the death of another person, the said Milton Mayfield, by shooting him with a pistol, in violation of § 13A-5-31 (a) (2) of the Alabama Criminal Code, againhst the peace and dignity of the State of Alabama."

Appellant argues that the State's evidence was insufficient to support his conviction because the deceased, Mr. Mayfield, was not a robbery victim within the meaning of § 13A-5-31 (a) (2). Appellant contends that the deceased cannot be classified as a victim of robbery for purposes of satisfying the statute on two premises: (1) no money was taken from the deceased's person or possession and (2) it was not shown that the deceased had any right to exercise dominion or control over the money.

We agree that for an accused to be guilty of violating § 13A-5-31 (a) (2) the person who is intentionally killed must be the victim of the robbery; however, we cannot say that as a matter of law, the deceased in this case was not a victim of the robbery. It is our opinion that he was a robbery victim.

There is no requirement in establishing a prima facie case of robbery that the property stolen belong to the robbery victim. Montgomery v. State, 169 Ala. 12, 53 So. 991 (1910); Williams v. State, 387 So. 2d 258 (Ala. Cr. App.), cert. denied, 387 So. 2d 261 (Ala. 1980), and there is no material variance between an indictment which charges that the property taken was the personal property of a named individual and proof showing that the property belonged to another or to a corporation. Williams, supra; Hobbie v. State, 365 So. 2d 685 (Ala. Cr. App. 1978).

It is not necessary that the property be taken from the person or possession of the robbery victim. Mays v. State, 335 So. 2d 246 (Ala. Cr. App. 1976).

This court defined robbery in Johnson v. State, 54 Ala. App. 586, 310 So. 2d 509 (1975) as follows:

> "Robbery is defined to be the felonious taking of money or goods of value from the person of another, or in his presence, against his will by violence, or by putting him in fear." [Emphasis added]. 310 So. 2d, at 511.

And as was stated by the Alabama Supreme Court in Cobern v. State, 273 Ala. 547, 142 So. 2d 869 (1962):

> "Nor, on a charge of robbery, must the stolen property be in the mancupation or on the person of the victim. It is sufficient if the property was taken from the victim's presence or personal protection." [Emphasis added] 142 So. 2d at 871.

The money in this case was clearly taken in Mr. Mayfield's presence; the cashier's cage was twenty-two feet away from where he was standing and was in his direct line of vision.

This court considered the issue of who could be considered a robbery victim in Woods v. State, 55 Ala. App. 450, 316 So. 2d 698 (1975). Factually, we believe Woods to be virtually indistinguishable from the instant case on that issue. For the sake of clarity, we here set out the crucial facts from Woods.

> "On November 13, 1974, the Center Drug Company, Inc., located at 3704 Governor's Drive, West, in Huntsville, Alabama, was robbed by two young white men. One had a pistol and the other had a knife. The robbery took place around 8:00 o'clock at night and there were only two people in the drugstore when the robbers entered. They were the pharmacist, Mr. Charles L. Johnson, and a salesclerk, Mrs. Cathy Rathbun.
>
> "Mr. Johnson testified that he was in the prescription department and his attention was attracted to a man with a gun in the back of Mrs. Rathbun marching her around the counter to the prescription department. He saw another young man immediately behind the man with the gun. This man had an open knife in his hand. The man with the gun said this is a holdup and 'they would shoot the girl if I didn't do what he said. He said he was an addict and wanted the hard drugs - Demerol, Morphine, Dilaudid and Leritine.' Mr. Johnson got the drugs and gave

them to the man with the gun who put them in a box and told Mr. Johnson to unlock the back door. He also picked up a sack of money containing about $200.00 on the counter nearby.

"After Mr. Johnson unlocked the back door the man with the gun told Mrs. Rathbun, who had been forced to kneel during the robbery, to stand up and act normal or he would shoot Mr. Johnson. Mrs. Rathbun stood up as she was directed. The robbers went out the back door." 316 So. 2d, at 699.

Woods claimed there was a fatal variance between the charge in the indictment (that he robbed Mrs. Rathbun) and the proof adduced at trial. Woods argued that Mr. Johnson, who was in charge of the drugstore, was the robbery victim, rather than Mrs. Rathbun who was only a salesgirl. This court, speaking through Judge Harris, wrote the following:

"As we view the evidence both Mrs. Rathbun and Mr. Johnson were in charge of the drugstore, either as conditional owner, or bailee, or agent. Mr. Johnson was in charge of the prescription department and Mrs. Rathbun was working in the other departments of the store where non-drug items were sold. It was Mrs. Rathbun that appellant put the gun in her back and forced her to march to the prescription department. The robbers threatened to kill both of them if they failed to obey orders. Howell v. State, 26 Ala. App. 612, 164 So. 764.

"On a charge of robbery it is not necessary that the stolen property be in the manucaption or on the person of the victim. It is sufficient if the property was taken from the victim's presence or personal protection. Cobern v. State, 273 Ala. 547, 142 So. 2d 869.

"In Argo v. State, 42 Ala. App. 454, 168 So. 2d 19, this court said:

"'There was no variance between the averments of the indictment that the money was the personal property of Robert P. Jackson and the proof showing that the money belonged to the State of Alabama.'

"Argo, supra, involved the robbery of a state liquor store.

"We hold there was no fatal variance between the averments of the indictment and the proof offered in support thereof."

In considering the facts before us in light of Woods, supra, we find the following similarities: (1) Mr. Mayfield, like the sales clerk, was working in a store he did not own when the robbery occurred; (2) Mr. Mayfield, like the sales clerk,

did not have possession of the property that was taken, nor did either one of them hand the money over to the robbers; (3) Both Mr. Mayfield and the sales clerk were threatened with being killed while in their capacities as store employees; (4) Neither Mr. Mayfield's nor the sales clerk's personal belongings were taken in the robberies, (5) Nor was the money taken from an area of the store directly under Mr. Mayfields's control or dominion. Substantively, the only difference in the two cases is that in Woods the robbers only threatened to kill the sales clerk if their instructions were not followed, while in this case Mr. Mayfield was actually killed after he was threatened. This distinction hardly makes Mr. Mayfield less a robbery victim than was the sales clerk.

In our judgment this case is controlled by Woods v. State, supra, and we hold that as a matter of law, Mr. Mayfield was a victim of a robbery within the meaning of § 13A-5-31 (a) (2).

II

We have no difficulty in determining that the victim in this case was "intentionally killed by the defendant" under the thoroughly reasoned principles discussed by our Supreme Court in Ritter v. State, 375 So. 2d 270 (Ala. 1979). There can be no question that appellant encouraged and supported Watkins and was present with Watkins' knowledge to render assistance should it become necessary, even though he did not pull the trigger on the weapon that killed the deceased. Clearly there was evidence before the jury which proved that appellant had the necessary "particularized intent to kill." 375 So. 2d at 274. The jury was properly charged by the trial court in this regard.

III

The death penalty provisions under which appellant was convicted are constitutional. Beck v. State, 396 So. 2d 645 (Ala. 1981); Willie Clisby, Jr. v. State, _____So. 2d ____ (Ala. Cr. App., Ms. 6 Div. 576, March 2, 1982); Jody Lynn Potts v. State, ____So. 2d ____, (Ala. Cr. App. Ms., 4 Div. 948, March 2, 1982).

IV

The State's delayed disclosure of the lineup sheet information in no way violated the principles enunciated in Brady

v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Evidence concerning the lineup was fully revealed during the trial through the testimony of the four eyewitnesses who viewed the lineup and through the testimony of Sgt. Wallace who conducted the lineup. A thorough and sifting cross-examination of these witnesses was conducted by appellant. There was simply no suppression of exculpatory evidence like the one condemned in Brady v. Maryland, supra.

Even where there is total nondisclosure of information the test is whether the use of the information at trial would have changed the result by creating a reasonable doubt where one did not otherwise exist. United States v. Aqurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); Jones v. State, 396 So. 2d 140 (Ala. Cr. App. 1981). As the United States Supreme Court stated in Beck v. Washington, 369 U.S. 541, 558, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962):

> "'While this Court stands ready to correct violations of constitutional rights, it also holds that it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality. United States ex rel. Darcy v. Handy, 351 U.S. 454, 462 (1956). This burden has not been met.'"

Appellant has not shown how he was actually harmed or prejudiced in this matter.

V.

There is no requirement in capital cases that a defendant be allowed to question each prospective juror individually during voir dire. Mack v. State, 375 So. 2d 476 (Ala. Cr. App. 1978), affirmed, 375 So. 2d 504 (Ala. 1979), vacated and remanded on other grounds, 405 So. 2d 701 (Ala. Cr. App. 1981). See also Seals v. State, 282 Ala. 506, 213 So. 2d 645 (1968).

VI

Any conflicts in the identification of appellant were resolved by the jury. Identification of an accused by only one witness is sufficient to establish his guilt. Robinson v. State,

389 So. 2d 144 (Ala. Cr. App.), cert. denied, 389 So. 2d 151 (Ala. 1980). A verdict rendered on conflicting identification testimony should not be disturbed on appeal. Howell v. State, 369 So. 2d 297 (Ala. Cr. App.), cert. denied, 369 So. 2d 303 (Ala. 1978).

VII

At the conclusion of the "guilt-finding phase" of appellant's trial, the jury returning its verdict finding appellant "guilty as charged in the indictment," the trial court conducted the "sentence-determining phase" of appellant's trial. This was done in accordance with Beck, supra.

During the "sentence-determining phase" of the trial the State presented evidence that appellant had been convicted of first degree murder and sentenced to life imprisonment on September 19, 1968. Appellant was properly allowed to introduce any matter relating to any mitigating circumstances. Both the prosecution and the defense were given an opportunity to argue for and against, respectively, the imposition of the death penalty. The jury was properly instructed concerning the "circumstances of aggravation and of mitigation that should be weighed and weighed against each other. . . ." 396 So. 2d at 662. The jury was specifically instructed that it could consider mitigating circumstances other than those listed in the statute, but that consideration of aggravating circumstances must be strictly limited to those defined by statute. The jury unanimously fixed appellant's sentence at death.

The trial court then conducted its separate sentence hearing in accordance with statute and the directions provided in Beck, supra. Following this procedure it was the judgment of the trial court that appellant's sentence remain fixed at death. 1/

On our appellate review of this case we have examined other cases in which the death penalty has been imposed and ascertain that the imposition of the death penalty in this case is

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1. See the appendix to this opinion for the trial court's findings of facts which set forth its basis for the sentence of death.

not substantially out of line with sentences imposed for other acts.

We have examined the record and transcript of evidence and find no error prejudicial to appellant; therefore, the judgment of conviction by the Jefferson Circuit Court is affirmed.

AFFIRMED.

All the Judges concur.

1/ APPENDIX

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA IN AND FOR JEFFERSON COUNTY

STATE OF ALABAMA, Case No. 80-00901

Plaintiff,

vs.

CHASTINE LEE RAINES, 1/

Defendant.

FINDING OF FACTS

I find as a fact that on November 26, 1980, that Chastaine Lee Raines and Darryl Travis Watkins went inside the Eugster Meat Market at 2833 Park Lawn Avenue, S.W., Birmingham, Alabama, armed with pistols with the express purpose of committing the crime of robbery. A third participant, possibly Benny Ray Jones, was lerking [sic] on the outside.

I find as a fact that Chastaine Lee Raines attacked and disarmed one William Sanders who was acting as security guard in the store for the specific purpose of preventing robberies. Now Chastaine Lee Raines disarmed Mr. Sanders, put two guns to his head and ordered him not to move or he would be killed.

I further find that then Darryl Travis Watkins leapt upon the counter within the store, ordered everyone down and when Milton Mayfield either refused or failed to comprehend Mr. Watkins' commands he was shot by Darryl Travis Watkins between the eyes killing him instantly. The robbers then left the store and went unapprehended for some 32 days.

1. While the style of the case carries the name "Chastine," the trial court's order uses the name "Chastaine."

Mr. Raines was placed in a lineup on December 28, 1980, along with six other individuals, and was positively identified by Mary Johnson as being outside the store immediately prior to the robbery and also by William Sanders as being the one who attacked and disarmed him.

I find that at the time of the offense the defendant was 31 years old and of at least average or above average intelligence.

Section 13A-5-35(2) (The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;) - I find as an aggravating circumstance that on September 19, 1968, Chastaine Lee Raines was convicted of murder in the first degree and sentenced to life imprisonment.

Although 13A-5-35(3) and (4) are likely to be present I specifically make no such finding.

Section 13A-5-36. Mitigating circumstances.

(1) The defendant has no significant history of prior criminal activity; I find to the contrary that the defendant has an extensive significant history of criminal activity.

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; I find that there was no evidence of any such extreme mental or emotional disturbance.

(3) Not applicable.

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor; this is a mitigating circumstance argued by the defendant in the penalty phase and I find it not applicable in this case. The participation of the defendant was certainly a major part in the operation and

certainly was not minor.

(5) Not applicable.

(6) Not applicable.

(7) The age of the defendant at the time of the crime; the defendant was 31 years old and that is certainly not a mitigating circumstance.

I therefore find 13A-5-35(2), aggravating circumstance, to be present and I find no mitigating circumstances to be present either enumerated or otherwise. I come to the conclusion that the aggravating circumstances in the case out weigh the mitigating circumstances and the verdict of the jury is and is due to be upheld.

I, therefore, sentence the defendant, Chastaine Lee Raines, to suffer death by electrocution on the 3rd day of October, 1981, and the Sheriff of Jefferson County, Alabama, is directed to deliver the defendant, the said Chastaine Lee Raines, to the custody of the Director of the Department of Corrections and Institutions at Montgomery, Alabama, and the designated executioner shall, at the proper place for the execution of one sentenced to suffer death by electrocution, cause a current of electricity of sufficient intensity to cause death and the application and continuance of such current to pass through the body of said Chastaine Lee Raines until said Chastaine Lee Raines is dead.

Dated this 6th day of July, 1981.

Charles R Crowder

Charles R. Crowder
Circuit Judge

NO. 82-6306

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

CHASTINE LEE RAINES,

Petitioner

v.

STATE OF ALABAMA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

CHARLES A. GRADDICK
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QUESTIONS PRESENTED FOR REVIEW

1. Does the Constitution prohibit imposing a sentence of death on a non-triggerman accomplice to an intentional killing who was prepared to kill, intended to kill, and supported the killing.

2. Should this Court review whether the Alabama Supreme Court properly decided the state law issue of whether the victim of the killing in this case was also a robbery victim within the meaning of the applicable Alabama statute?

3. Should this Court use this case, which did not even involve non-disclosure of exculpatory evidence, to reconsider its decision in United States v. Agurs, 427 U.S. 97 (1976), concerning when non-disclosure of exculpatory evidence requires a new trial?

PARTIES

The caption contains the names of all the parties in the court below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming petitioner's conviction and death sentence, Chastine Lee Raines v. State, No. 6 Div. 688 (Ala. Cr. App. April 20, 1982), is not yet published. A copy of the manuscript opinion was submitted as Appendix B to the petition.

2. The opinion of the Alabama Supreme Court affirming the Court of Criminal Appeals decision, Chastine Lee Raines v. State, No. 81-746 (Ala. Dec. 30, 1982), is not yet published. A copy of the manuscript opinion was submitted as Appendix A to the petition.

JURISDICTION

The decision of the Alabama Supreme Court from which petitioner seeks relief was entered on December 30, 1982, and thereafter stayed for sixty days to permit filing of the petition. The petition was timely filed on February 25, 1983.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition addresses issues involving the Eighth and Fourteenth Amendments to the United States Constitution as well as Code of Alabama 1975, §13A-5-31(a)(2).

STATEMENT OF THE CASE

The facts of the crime, as found by the Court of Criminal Appeals, are as follows:

> Appellant [the petitioner here] and Darryl Travis Watkins entered Eugster's Meat Market in the Powderly area of Birmingham around 10:30 A. M. on November 26, 1980. Both appellant and Watkins were armed with pistols. Mr. L. E. Owens (the owner of the market), his wife, a security guard, three or four butchers and two customers were in the store at that time. As appellant and Watkins came in the front door appellant walked toward the meat counter, knocked the security guard to the floor by striking him with his pistol, took the security guard's pistol away from him and told him to "lay down or I'll kill you." At the same time Watkins pushed Mrs. Owens and jumped up on a counter between the cashier's cage and the meat counter. Watkins ordered everyone to "get down" and to "move it."
>
> Seventy-nine year-old Milton Mayfield, the deceased, was operating a slicing machine located twenty-two feet from the cashier's cage directly in Watkins' line of fire. The deceased's vision was poor and he also had a hearing impairment. When Watkins ordered everyone to "get down" the deceased either could not comprehend Watkins' commands or for some other reason failed to respond. Watkins' then took direct aim and shot the deceased between the eyes. Watkins next held his gun to Mrs. Owens' head and ordered Mr. Owens, who was standing inside the cashier's cage, "to give him all the money." Mr. Owens placed approximately $2,400. in the yellow bag he was handed by Watkins. Appellant and Watkins then fled from the scene by running out the front door.

Chastine Lee Raines v. State, No. 6 Div. 688 (Ala. Cr. App. April 20, 1982), Ms. op. at 2.

On April 10, 1981, petitioner was indicted by the Jefferson County Grand Jury for the Code of Alabama 1975, §13A-5-31(a)(2) capital offense of "robbery or attempts thereof when the victim is intentionally killed by the defendant." (R. 781-782) The trial began on June 29, 1981, and on July 1, 1981, the jury returned a verdict convicting petitioner of the capital offense. (R. 810)

Following a separate sentence hearing, the jury fixed petitioner's sentence at death (R. 647-721, 810), and the trial court on July 6, 1981 upheld that sentence (R. 811-815).

On April 20, 1982, the Alabama Court of Criminal Appeals affirmed petitioner's conviction and death sentence, Chastine Lee Raines v. State, No. 6 Div. 688, and on Dec. 30, 1982, the Alabama Supreme Court affirmed that decision, Chastine Lee Raines v. State, No. 81-746.

SUMMARY OF ARGUMENT

This case involves a non-triggerman defendant convicted of the Alabama capital offense of robbery-intentional killing. All Alabama capital offenses include intent to kill as an element, and under Alabama law which was applied to this case a non-triggerman may be convicted of the capital offense if, but only if, he has a particularized intent to kill and is an accomplice to the intentional killing itself instead of simply to the underlying non-homicide felony. In reviewing a capital case involving a non-triggerman defendant the Alabama appellate courts apply a two-fold test: whether the jury was properly instructed on the intent to kill requirement; and whether there was sufficient evidence from which the jury could find beyond a reasonable doubt that the non-triggerman defendant possessed the necessary intent to kill. Only after applying that two-fold test did the Alabama Supreme Court hold that petitioner was properly convicted and sentence to death.

The only issue presented by this case relevant to petitioner's non-tiggerman status is whether the Constitution forbids imposing a sentence of death on a non-triggerman who was an accomplice to the intentional killing itself, who possessed intent to kill, and who supported the killing. That is not a substantial federal issue.

The Alabama statute specifying the capital offense of robbery-intentional killing requires that the person killed be a victim of the robbery. The Alabama Supreme Court held that Milton Mayfield, the person killed in this case, was a robbery victim within the meaning of the Alabama statute. That holding is a state law matter which is not within the province of this Court.

Contrary to the suggestion in the petition, this case is not a good vehicle for this Court to use to reconsider its holding in United States v. Agurs, 427 U.S. 97 (1976), concerning when non-disclosure of exculpatory evidence requires a new trial. This case did not even involve non-disclosure, but only delayed disclosure of certain lineup information useful to the defense. The Alabama Supreme Court found that petitioner was not harmed at all by discovery of that evidence at trial instead of earlier, because he could not have used the evidence any more effectively had it been disclosed earlier.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The petition for a writ of certiorari should be denied because the only federal issues presented are insubstantial ones.

I. THE ONLY NON-TRIGGERMAN ISSUE PRESENTED IS AN INSUBSTANTIAL ONE

Contrary to the assertions in the petition, this is not a case in which a defendant sentenced to death lacked intent to kill as required in Enmund v. Florida, 102 S. Ct. 3368 (1982). The Alabama capital offense statute under which petitioner was convicted requires intent to kill. Code of

Alabama 1975, §13A-5-39(a)(2) and (b); Beck v. State, 396 So. 2d 645, 662 (Ala. 1980) ("Each of the fourteen crimes specified requires an intentional killing with aggravation...") (emphasis added). Under that statute, as interpreted by the Alabama Supreme Court, a non-triggerman may be convicted of a capital offense and sentenced to death in Alabama if, but only if, the State proves beyond a reasonable doubt that the non-triggerman possessed the requisite intent to kill and knowingly aided and abetted the intentional killing itself. Chastine Lee Raines v. State, No. 81-746 (Ala. Dec. 30, 1982), Ms. op. at 2-4; Ritter v. State, 375 So. 2d 270, 273-275 (Ala. 1979), vacated and remanded on unrelated grounds, 448 U.S. 903 (1980).

The Alabama Supreme Court announced and applied in this case a two-part test for ensuring that the Enmund v. Florida, 102 S. Ct. 3368 (1982), and Alabama law requirement of intent to kill is observed in non-triggerman cases such as the present one:

> To affirm a finding of a "particularized intent to kill," the jury must be properly charged on the intent to kill issue, and there must be sufficient evidence from which a rational jury could conclude that the defendant possessed the intent to kill. The Court of Criminal Appeals found in the affirmative on both parts of this two-part test; and, upon careful review of the record, we discern no basis for disturbing that finding.

Chastine Lee Raines v. State, supra, Ms. op. at 4. That test was properly applied in this case.

In his oral charge at the guilt stage, the trial judge told the jury that petitioner was charged with the capital offense of "while committing a robbery or attempting to commit a robbery intentionally killing the victim thereof." (R. 611, 619) The judge stressed that in order to constitute a capital offense the killing of the robbery victim must have been intentional rather than negligent or reckless, and he defined what intentional means. (R. 623)

The judge took note of the fact that the evidence indicated that more than one person was involved in the crime, and he explained the general law of aiding and abetting to the jury. (R. 619-621) He then focused specifically on the aiding and abetting doctrine as it related to the intent to kill requirement applied to a non-triggerman:

> This Defendant is the one on trial. Now you look to the evidence to determine if this Defendant is guilty, if you come to the conclusion beyond a reasonable doubt that the capital offense did take place, that is a robbery took place and that Milton Mayfield was intentionally killed by someone, then you come to the evidence to determine if this Defendant is guilty of the capital offense as charged in the indictment.
>
> The evidence in this case presented by the State indicated that someone other than the Defendant fired the one shot which killed Mr. Mayfield. Now we come back to the aiding and abetting conspiracy. In order to find this Defendant guilty of the capital offense as charged in this indictment, you must believe beyond a reasonable doubt that while he was committing a robbery or aiding and assisting another to commit a robbery that he also either by prearrangement, that is prearrangement or on the spur of the moment, helped, assisted by words, acts or deeds or was ready, willing and able to assist in seeing that Milton Mayfield was also intentionally killed. In other words, just the contemplation of the robbery would not be enough. He would also have to be implicated by affirmative action, words, assistance, deeds, in the intentional killing of Mr. Mayfield. You must look to all of the surrounding facts and circumstances. These are mental elements. These are things that are in people's minds and very rarely, certainly we have no way of projecting thoughts in people's minds. So you look to all the surrounding facts and circumstances in this case. All of them. Use your common sense and draw upon those inferences to determine if this Defendant aided and abetted or participated in a robbery, as I have defined that crime robbery to you, and also aided, assisted, helped, was ready, willing and able to help if it became necessary in the intentional, intentional killing of Milton Mayfield and that that is the man in the store.

> If you are convinced beyond a reasonable doubt of those things, all of those things, that is that the robbery took place and that this Defendant was guilty of the robbery and that Mr. Mayfield was intentionally killed and also this Defendant helped, aided, assisted or conspired by prearrangement or on the spur of the moment to help in seeing him intentionally killed, if you believe all of those things and that he is the man, if you believe all of those things beyond a reasonable doubt, then it would be your duty to find the Defendant guilty of the capital offense as charged in the indictment.

(R. 624-626) (emphasis added)

Then, the judge charged the jury on the lesser included non-capital offense of murder of the felony murder type. (R. 626-629) See, Code of Alabama 1975, §13A-6-2(a)(3). He explained the felony murder doctrine, and explained that that doctrine could not be used to supply the intent to kill required for the capital offense:

> The lesser included offense of murder and this is where it kind of gets complicated. You have something that is called the felony murder doctrine. That is where someone while committing the offense of robbery someone is killed. It might could have been foreseen or should have been foreseen that someone would die, then that person is guilty of murder. What distinguishes that from the capital offense? The capital offense indicates that it must be intentional killing and that the Defendant aided and assisted and helped specifically in that intentional killing. Now if you believe beyond a reasonable doubt that this Defendant was guilty of participating in or committing the offense of robbery, but that he had nothing whatsoever to do with the killing of Mr. Mayfield, that is that was the act of another without any help of his; there was no plan or scheme or thought, he was not ready, in other words, this Defendant did not contemplate anyone being killed and did not assist in anyone being killed, did not help in anyone being killed either by prearrangement or on the spur of the moment, then he cannot be found guilty of the capital offense. But, if you believe that he was the one in the store and was participating in the robbery, the same elements I said before, but did not actually help in the intentional killing of Mr. Mayfield,

then you could not find him guilty of the capital offense as charged in the indictment but it would be your duty to find him guilty of murder as charged in the indictment. Because, you see, in order for it to be murder someone must be intentionally killed. In order for it to be murder the person must be intentionally killed. The law says that while you are engaged in a robbery, a rape, that is not involved in this case, but a robbery, and someone is killed, that supplies the intent. The law says that intent is supplied by the mere fact that someone is committing a robbery and someone dies. But that does not make it the capital offense. In order for it to rise to the capital offense, while in that robbery the victim must be intentionally killed, not supplied by the felony murder doctrine as I have just said, not supplied by the mere fact that someone is engaged in a robbery; but intention to kill.

. . .

So, if you believe beyond a reasonable doubt that this Defendant, Chastaine Raines, was engaged in the crime of robbery, either himself or aiding and assisting another to commit the crime of robbery, but that he had nothing to do with the intentional killing of Mr. Mayfield or, you may find that Mr. Mayfield was not intentionally killed by anyone, then you could not find the Defendant guilty of capital murder but you must find him guilty of murder.

(R. 626-629) (emphasis added)

The trial judge also referred to these fundamental principles in discussing the possible verdict forms with the jury. As to the verdict form finding the petitioner guilty of the capital offense, the trial judge told the jury:

> that is if you are convinced beyond a reasonable doubt that a robbery did take place and that Mr. Mayfield was intentionally killed then you would find from the evidence that a capital offense did in fact take place and then you look to the evidence to determine the guilt or not guilty of this Defendant, Chastaine Raines; did he commit the robbery either himself or aided or assisted another in committing the robbery and did he aid or assist another's specific intent to kill, that is the specific intent to kill Mr. Mayfield. <u>If you believe that this Defendant aided or assisted or helped or performed any of the acts comprising the robbery and he aided or assisted or abetted, conspired with another either on</u>

> prearrangement or on the spur of the moment to intentionally kill Mr. Mayfield, then the form of your verdict would be, "We, the jury, find the Defendant guilty of the capital offense as charged in the indictment." The question of punishment at this phase is not for your consideration and should not be discussed among the jury at this phase.

(R. 630-631) (emphasis added)

As to the verdict form finding the petitioner guilty of the lesser included offense of non-capital murder, the trial judge told the jury:

> If after a full and fair consideration of all of the evidence in this case you are convinced beyond a reasonable doubt that this Defendant, Chastaine Raines, conspired or helped or aided or assisted another in the commission of a robbery, as I have already defined that term, but did not aid or assist in intentionally killing Mr. Mayfield, or Mr. Mayfield was not intentionally killed by anyone, but that Mr. Mayfield is dead as a result of this robbery and this Defendant participated, either aided or assisted in that robbery as I have defined that or committed the robbery himself, but did not aid or assist in the intentional killing of Mr. Mayfield, then the form of your verdict would be, "We, the jury, find the Defendant guilty of murder as charged in the indictment." ...

(R. 631-632) (emphasis added) Both sides announced their satisfaction with the oral charge. (R. 634)

The trial judge had in the course of his oral charge invited the jury to come back from its deliberation and ask him any questions about the law that they would like to be re-instructed on. (R. 609-610) During its deliberations, the jury did return to the courtroom to ask questions about the applicable law. (R. 636-643) Included in these queries were questions about the intentional killing requirement and the aiding and abetting doctrine. (R. 638-643) The trial judge took great pains to answer the jury's questions in detail. (R. 638-643) In doing so, he emphasized to the jury that in order to find the petitioner guilty of the capital offense the jury would have to be convinced beyond a

reasonable doubt that he aided and abetted the intentional killing itself instead of just the robbery. (R. 640-642)

In summary, the trial judge's oral charge to the jury correctly explained the applicable law concerning the intent to kill requirement and the aiding and abetting doctrine as it relates to a non-triggerman capital defendant. Moreover, when the jury returned from its deliberations for further instruction, the trial judge explained that applicable law again and emphasized to the jury that it could convict the petitioner of the capital offense only if it found beyond a reasonable doubt that he aided and abetted the intentional killing itself as well as the robbery.

The sufficiency of the evidence prong of the two-part intent to kill test was also correctly applied in this case. The State's evidence showed that seconds before petitioner's co-defendant murdered the victim in this case petitioner himself, who was armed, threatened to kill a security guard if he did not lay down as ordered. (R. 425, 470-474) Therefore, petitioner actually expressed his own intent to kill anyone who did not get down as ordered, which is exactly why the victim was in fact murdered by petitioner's co-defendant. (R. 343-344). Petitioner's own words uttered seconds before the murder establish abundant evidentiary basis for the finding of intent to kill that is implicit in the jury verdict. As the Alabama Supreme Court held:

> Pulling the trigger is only one factor in determining intent to kill. Ritter v. State, 375 So. 2d 270, 274-275 (Ala. 1979). From the testimony concerning the defendant's words and actions during the course of the robbery, the jury had sufficient evidence from which to infer that the defendant was prepared to kill, intended to kill, and supported Watkins in his killing of Mr. Mayfield and, thus, that the defendant was an accomplice to the intentional killing of Mr. Mayfield.

Chastine Lee Raines v. State, No. 81-746 (Ala. Dec. 30, 1982), Ms. op. at 4.

Given the facts of this case and the law applied by the Alabama Supreme Court the only issue presented concerning petitioner's non-triggerman status is whether the Constitution forbids imposing a sentence of death on a non-triggerman accomplice to the intentional killing itself when he was prepared to kill, intended to kill, and supported the killing. That is not a substantial question which merits this Court's review. See, Enmund v. Florida, 102 S. Ct. 3368, 3383 n. 20 (1982) (dissenting opinion of O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, J.J.); Lockett v. Ohio, 438 U.S. 586, 627-628 (1978) (opinion of White, J., concurring in part and dissenting in part).

II. THE VICTIM STATUS ISSUE IS PURELY ONE OF STATE LAW

As a matter of Alabama statutory law, the robbery-intentional killing capital offense requires that the person killed be a victim of the underlying robbery. Code of Alabama 1975, §13A-5-31(a)(2) ("Robbery or attempts thereof when the victim is intentionally killed..."). The person killed in this case, Milton Mayfield, was an employee of the store that was robbed. Chastine Lee Raines v. State, No. 6 Div. 688 (Ala. Cr. App. April 20, 1982), Ms. op. at 2, 4-6. The Alabama Court of Criminal Appeals, relying heavily on an eight-year-old Alabama robbery decision, held that Milton Mayfield was a robbery victim within the meaning of the Alabama capital punishment statute. Id., at 3-6. After reviewing the record and opinion of the lower appellate court, the Alabama Supreme Court found that the Court of Criminal Appeals had correctly applied Alabama law on this issue; adopted that section of the Court of Criminal Appeals opinion; and held as a matter of Alabama law that Milton Mayfield was a victim of the robbery within the meaning of

the Alabama statute. Chastine Lee Raines v. State, No. 81-746 (Ala. Cr. App. Dec. 30, 1982), Ms. op. at 4-5.

Petitioner's contention that the Alabama Supreme Court misapplied Alabama law in holding that Milton Mayfield was a robbery victim within the meaning of the statute is nothing more than a state law issue. State supreme courts are the final arbiters of state law, and it is not this Court's function to review their decisions of state law questions. E.g., Missouri v. Hunter, 51 U.S.L.W. 4093, 4096 (Jan. 19, 1983); O'Brien v. Skinner, 414 U.S. 524, 531 (1974); Garner v. Louisiana, 368 U.S. 137, 169 (1961); see, e.g., 28 U.S.C. §1257(c); Supreme Court Rule 17.1(b) and (c).

III. THIS CASE IS NOT A GOOD VEHICLE TO USE TO RECONSIDER UNITED STATES v. AGURS, 427 U.S. 97 (1976)

Before the Alabama Court of Criminal Appeals, petitioner complained about the delayed disclosure of some lineup sheet information which neither the prosecutor nor defense counsel learned about until during the trial. (R. 766) The Court of Criminal Appeals extrapolated the test for non-disclosed evidence announced in United States v. Agurs, 427 U.S. 97 (1976), and held that petitioner was not entitled to a new trial because earlier disclosure of the lineup sheet information would not have resulted in creation of a reasonable doubt where one did not otherwise exist. Chastine Lee Raines v. State, No. 6 Div. 688 (Ala. Cr. App. April 20, 1982), Ms. op. at 6-7.

The Alabama Supreme Court affirmed that reasoning and held:

> The information was put before the jury and, in the words of the trial court, "dealt a jolt" to the state. The information was subject to a "thorough and sifting cross examination," as the Court of Criminal Appeals held. The information was exploited as fully as it

could have been, in contrast to the total suppression of exculpatory evidence found in Brady v. Maryland, 373 U.S. 83 (1963).

> Even in the case of total nondisclosure, the information must create a reasonable doubt where one did not otherwise exist. United States v. Agurs, 427 U.S. 97 (1976). The defendant's burden is to show that reasonable doubt "not as a matter of speculation, but as a demonstrable reality." Beck v. Washington, 369 U.S. 541, 558 (1962). We agree with the Court of Criminal Appeals that the appellant has failed to show how he was actually harmed by the delayed disclosure of the information. Appellant's argument that the information would have enabled more effective preparation for trial was rejected in United States v. Agurs, supra, at 112 n. 20, on the grounds that an argument could always be made that knowledge of the prosecutor's case, both incriminating and exculpatory, would help defense counsel in preparation of the case for the defense. Therefore, the proper focus is upon the materiality in the nondisclosure or delayed disclosure of exculpatory information in determining the denial vel non of defendant's rights of due process and fair trial -- a showing not made by this defendant.

Chastine Lee Raines v. State, No. 81-746 (Ala. Dec. 30, 1982), Ms. op. at 5-6.

Petitioner apparently concedes that the Agurs test for non-disclosed exculpatory evidence was correctly applied in this case, because on pp. 17-18 of the petition he asks this Court to use this case as a vehicle for re-considering that test. This case is not a good vehicle for such use because this case, unlike Agurs, involves delayed disclosure of exculpatory evidence. The significance of that difference is indicated by the fact some courts have held that since there is no constitutional requirement that exculpatory evidence be disclosed prior to trial, disclosure of such evidence at trial is not even governed by the Agurs test. E.g., United States v. Allain, 671 F. 2d 248, 255 (7th Cir. 1982); United States v. Ellsworth, 647 F. 2d 957, 961 (9th Cir. 1981).

If this Court chooses to reconsider its Agurs holding concerning the test for determining when a new trial is

required because of non-disclosed exculpatory evidence, it should do so in a case involving non-disclosed evidence because only such a case presents that issue. This is not such a case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of this brief on petitioner by placing a copy in the United States mail, postage prepaid, and properly addressed to his counsel of record as follows:

Hon. James G. Stevens
P. O. Box 20634
Birmingham, Alabama 35216

I further certify that I have served all parties required to be served.

Done this 23rd day of March, 1983.

Edward E. Carnes

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